Supreme Court, U.S.
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NO. 90-1554

in the Supreme Court of the United States

OCTOBER TERM, 1990

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,

Petitioners,

vs.

EASTERN AIRLINES, INC., a Delaware corporation,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent Eastern Airlines, Inc. raises three points in opposition to the Petition for Writ of Certiorari. Each is premised on an inaccurate statement of the proceedings and holdings below.

ARGUMENT

I.

THE QUESTION PRESENTED WAS PROPERLY RAISED IN THE FLORIDA COURTS.

First, Respondent contends that any issue concerning the phrase "willful misconduct" as used in the Warsaw Convention has not been preserved because it was not raised in the Florida Supreme Court. This contention is without merit because this federal issue was fully litigated in the Florida district court of appeal. The Florida Supreme Court did not consider the case on the merits, but simply declined to accept jurisdiction to review the decision of the district court of appeal on the merits. Under these circumstances, the federal issue has been fully litigated and properly preserved.

Respondent ignores the structure of the Florida appellate courts. Florida has a two-tier system, with five district courts of appeal and a supreme court. The district courts of appeal are not "intermediate" appellate courts but "are courts primarily of final appellate jurisdiction". *Jenkins v. State*, 385 So.2d 1356, 1358 (Fla. 1980). The Florida Supreme Court does *not* have discretionary jurisdiction to review any district court of appeal decision. As pertains to this case, the Florida Supreme Court's jurisdiction is limited to a district court of appeal decision which "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law". Florida Const., art. V, § 3(b)(3); *Jenkins v. State, supra.*

Further, Florida Supreme Court review is a two-step procedure. First, petitions are filed "limited solely to the issue of the Supreme Court's jurisdiction". Fla.R.App.P. 9.120(d). Briefs on the merits are filed only after the Supreme Court decides to accept jurisdiction. Fla.R.App.P. 9.120(f).

Here, the Florida Supreme Court simply declined to accept jurisdiction. (App. 5). No occasion or opportunity existed to present to the Florida Supreme Court the issue now before this Court. Under those circumstances, it is the merits of the Florida district court of appeal decision, not the jurisdictional decision of the Florida Supreme Court, which is properly before this Court. *Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 237 n.1 (1967).

In sum, the federal issue raised in the Florida district court of appeal and presented to this Court does *not* constitute a basis for Florida Supreme Court jurisdiction. It could not have been raised in the Florida Supreme Court jurisdictional briefs. The failure to raise that which could not have been raised does not waive the right to seek review in this Court.

II.

THE DECISION OF THE STATE COURT BELOW DOES CONFLICT WITH OTHER COURTS CONCERNING THE MEANING OF THE PHRASE "WILLFUL MISCONDUCT" AS USED IN THE WARSAW CONVENTION.

Respondent claims that the state courts applied the proper standard for "willful misconduct" because those

courts cited *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), as support for that standard. Respondent misses the point. Although those courts cited *Butler*, they then went on to apply a completely different standard—the state law standard required to support a claim for reckless or intentional conduct.

> We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. *It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct".*

557 So.2d at 578.

This Court need merely compare the state law standard to support a claim for reckless or intentional conduct with the federal standard for "willful misconduct" under the Warsaw Convention. The state law standard is clear. A claim exists

> only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

557 So.2d at 576. The federal standard for "willful misconduct" is also clear. It means "a deliberate purpose not to discharge some duty necessary for safety". *Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985). See also cases cited in Petition at 10. The two standards are not the same. The conflict is patent.

III.

THE QUESTION PRESENTED DOES NOT ASK THIS COURT TO RESOLVE A FACTUAL DISPUTE.

Respondent asks this Court to deny the Petition because the resolution of "willful misconduct" under the Warsaw Convention is ultimately a factual issue. As detailed above, this case is not about a factual dispute. If the Florida courts had resolved the issue of "willful misconduct" utilizing the proper federal standard, review would not be appropriate in this Court. But the Florida courts did not do that. Instead, they announced a new and fundamentally different standard for "willful misconduct" under the Convention, a state law standard which has no place in any proper analysis. Although it is not the role of this Court to review factual disputes, this Court is and should be the final arbiter of disputes concerning the interpretation of an international treaty. Resolution of that dispute will affect not only the litigants in this case, but the rights of all passengers and airlines involved in international flight.

CONCLUSION

For the foregoing reasons, Petitioners, Kevin King, as father and next friend of Ben King, a minor, and Kevin King and Mary Jo King, individually, respectfully request this Court to grant a Writ of Certiorari to review the judgment of the state court.

Respectfully submitted,

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